

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENT A. SHIVELY)	
Claimant)	
VS.)	
)	Docket No. 1,054,181
)	
CENTRAL MARKETING, INC.)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the June 14, 2011, Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. This appeal was placed on the Board's summary docket for disposition without oral argument. The Director appointed E. L. Lee Kinch of Wichita, Kansas, as a Board Member Pro Tem in this matter.

APPEARANCES

R. Todd King of Wichita, Kansas, appeared for claimant. Ali N. Marchant of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 14, 2011, motion hearing and exhibits thereto and the transcript of the February 2, 2011, evidentiary deposition of Stoney Mott, together with the pleadings contained in the administrative file.

ISSUES

In the June 14, 2011, Order, ALJ Barnes determined that claimant is entitled to penalties for untimely paid or unpaid medical bills. At the motion hearing, claimant did not request penalties for, nor did the ALJ assess penalties for, respondent's failure to pay or

pay in a timely manner medical mileage and prescriptions. Therefore, the Board assumes those bills were paid in a timely manner.

Respondent contends ALJ Barnes erred in assessing penalties against it because the bills provided to respondent were not in the proper format required by the Kansas Fee Schedule.¹ Respondent argues that if the Board determines penalties should be assessed, the penalties should be based on the actual amounts paid by respondent to the medical providers, not the amounts billed by the providers.

Claimant contends the Board does not have jurisdiction to hear this appeal at this juncture. If the Board has jurisdiction, claimant requests the Board affirm the Order as the Order follows the strict and literal language of K.S.A. 44-512a. Respondent submits the Board has jurisdiction to hear this appeal.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to hear this appeal?
2. If so, should respondent be assessed penalties pursuant to K.S.A. 44-512a for untimely paid or unpaid medical bills?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

On February 21, 2011, claimant's counsel sent a letter to respondent's counsel demanding payment of certain medical bills, medical mileage, prescription reimbursement and reimbursement for wound care. A copy of bills accompanied the letter. On February 28, 2011, claimant filed an application for preliminary hearing and attached thereto was a copy of the letter and medical bills.

On March 10, 2011, the ALJ issued an Order requiring respondent to pay temporary total disability payments, five medical bills listed in the Order, mileage reimbursement and prescription reimbursement. Claimant's attorney² and respondent's attorney³ admit they agreed upon the Order. The pertinent part of the March 10, 2011, Order is as follows:

¹ Kansas Department of Labor Workers Compensation Schedule of Medical Fees, 2010 Edition.

² M.H. Trans. at 4.

³ Respondent's Brief at 2 (filed July 15, 2011).

Respondent shall pay all authorized and related medical expenses to include:

Via Christi Hospital, January 1, 2011 - March 31, 2011, \$4,516.00⁴
Via Christi Hospital, December 17-31, 2010, \$24,008.90
Advanced Orthopedics Associates, December 21-23, 2010, \$1,420.00
Kansas Inpatient Services, December 20-22, 2010, \$422.00
Kansas Imaging Consultants, December 17-20, 2010, \$100.00

Respondent to pay mileage reimbursement of \$105.90 and prescription reimbursement totaling \$279.74.⁵

After waiting more than 10 days, claimant sent a demand for payment by certified mail on March 24, 2011.

A motion hearing was held on June 14, 2011. No witnesses testified at the hearing. Claimant asserted and respondent acknowledged the demand was sent “appropriately.”⁶ Respondent did not assert that claimant failed to comply with the statutory requirements of K.S.A. 44-512a.

At the motion hearing, respondent argued the medical providers must print the bills on a CMS 1500 form or an equivalent form containing the same information (hereinafter referred to as CMS 1500) as required by the Kansas Fee Schedule. Respondent alleges that initially the medical providers failed to use form CMS 1500. Respondent had to contact the medical providers and request the bills be resubmitted using the CMS 1500 form. At the motion hearing respondent’s counsel stated, “. . . we’ve been working since the day we agreed on this order [March 10, 2011, Order] to get the copies of what we needed to get them paid”⁷ Respondent asserted that once the insurance carrier received the bills on the CMS 1500 form, the bills were put “through for negotiation and payment.”⁸

According to statements of counsel, four of the five medical bills were paid, but admittedly were not paid within the 20-day demand period. The Via Christi bill totaling \$24,008.90 was paid on May 31, 2011. However, respondent only paid Via Christi \$1,788.06. Respondent alleges it was able to reduce the bill using the Kansas Fee

⁴ The medical bill is for services provided from January 3 through January 31, 2011.

⁵ ALJ Order (March 10, 2011) at 1.

⁶ M.H. Trans. at 4.

⁷ *Id.*, at 9

⁸ *Id.*

Schedule or through negotiations. No evidence was presented by the parties to determine whether this allegation is true.

Respondent was ordered to pay Kansas Imaging Consultants \$100.00. On May 20, 2011, it paid Kansas Imaging Consultants \$73.02, using the Kansas Fee Schedule or through negotiation. Kansas Inpatient Services billed \$422.00 for medical treatment provided for claimant. On May 20, 2011, respondent paid \$265.86 on that bill. Respondent asserted the bill was reduced using the Kansas Fee Schedule or through negotiation. Claimant's attorney stipulated the Advanced Orthopaedic Associates bill was paid on time. Advanced Orthopaedic Associates was paid \$1,327.71 on April 7, 2011.

One medical bill owed by respondent to Via Christi Hospital in the amount of \$4,516.00 remained unpaid as of June 14, 2011, the date of the motion hearing. Respondent also paid several other medical bills of claimant that were not specifically listed in the March 10, 2011, Order.

Claimant requested the ALJ to require that respondent pay a 10% penalty on all unpaid medical bills and medical bills not timely paid. Respondent contends that if penalties are assessed, the penalties should be based upon the medical expenses paid by respondent, not the amount originally billed. As stated above, through negotiations and use of the Kansas Fee Schedule, respondent contends it negotiated a substantial reduction in four of the five medical bills.

Respondent asserts Travelers has requested of Via Christi "more than once" that the unpaid bill be resubmitted using the correct form. Respondent presented no evidence to show when or how many times Travelers requested the medical providers resubmit the medical bills using form CMS 1500. Respondent likewise presented no evidence that the billing forms utilized by the providers were not equivalent to the form CMS 1500. It is unknown whether the amounts paid by respondent were accepted by the medical providers in full and final satisfaction.

PRINCIPLES OF LAW

K.S.A. 44-534a(a)(2) states:

Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or

temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2010 Supp. 44-551(i)(2)(A) states:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

In *Waln*,⁹ the Kansas Court of Appeals held that the district court has jurisdiction to review appeals from K.S.A. 44-512a penalty assessments made prior to the entry of a final award. The court went on to say that a K.S.A. 44-512a penalty assessment is not a preliminary order. The Board has also reviewed penalty assessments. The Board has

⁹ *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).

held that an award of penalties is not a preliminary order pursuant to K.S.A. 44-534a, but rather is treated as a final award.¹⁰

K.S.A. 44-512a(a) and (b) state:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

K.S.A. 2010 Supp. 44-510i(c) in part states:

The director shall prepare and adopt rules and regulations which establish a schedule of maximum fees for medical, surgical, hospital, dental, nursing, vocational rehabilitation or any other treatment or services provided or ordered by health care providers and rendered to employees under the workers compensation act and procedures for appeals and review of disputed charges or services rendered by health care providers under this section;

¹⁰ See, e.g., *Tucker v. Raytheon Aircraft Company*, No. 1,020,966, 2005 WL 3030758 (Kan. WCAB Oct. 28, 2005); *Burciaga v. Recreation Vehicle Products*, No. 259,230, 2002 WL 230942 (Kan. WCAB Jan. 29, 2002); *McLaughlin v. Automotive Controls Corporation*, No. 233,793, 2000 WL 235546 (Kan. WCAB Feb. 29, 2000).

. . . .

(3) Any contract or any billing or charge which any health care provider, vocational rehabilitation service provider, hospital, person or institution enters into with or makes to any patient for services rendered in connection with injuries covered by the workers compensation act or the fee schedule adopted under this section, which is or may be in excess of or not in accordance with such act or fee schedule, is unlawful, void and unenforceable as a debt.

K.A.R. 51-9-7 (2010 Supp.) by reference adopts the Kansas Department of Labor Workers Compensation Schedule of Medical Fees, 2010 Edition (Kansas Fee Schedule). The Kansas Fee Schedule at page 1 states, "Billing for all physician services, whether provided in a physician's office, hospital, or any other setting, must be submitted using the CMS 1500 form or an equivalent form containing the same information."

K.S.A. 44-510j in part states:

When an employer's insurance carrier or a self-insured employer disputes all or a portion of a bill for services rendered for the care and treatment of an employee under this act, the following procedures apply:

(a)(1) The employer or carrier shall notify the service provider within 30 days of receipt of the bill of the specific reason for refusing payment or adjusting the bill. Such notice shall inform the service provider that additional information may be submitted with the bill and reconsideration of the bill may be requested. The provider shall send any request for reconsideration within 30 days of receiving written notice of the bill dispute. If the employer or carrier continues to dispute all or a portion of the bill after receiving additional information from the provider, the employer, carrier or provider may apply for an informal hearing before the director.

The Board in *Wright*¹¹ discussed at length the interrelationship between K.S.A. 44-512a and K.S.A. 2010 Supp. 44-510i (then K.S.A. 44-510). In *Wright*, a November 5, 1998, Order stated, "The outstanding medical is ordered paid as authorized medical."¹² At the time, the outstanding medical expenses included statements from the Wichita Clinic for medical services provided in September and October 1998. On November 10, 1998, claimant's counsel sent a demand letter to respondent's counsel demanding payment of the itemized medical expenses and attached a copy of the bills. The letter demanded payment within 20 days pursuant to K.S.A. 44-512a.

At the same time, respondent appealed the Order to the Board. After the Board affirmed the Order, claimant's counsel sent another demand letter. The insurance carrier

¹¹ *Wright v. Lies Ready Mix and Paving*, No. 237,557, 1999 WL 1113627 (Kan. WCAB Nov. 18, 1999).

¹² *Id.*

initially received the bills, but they were not on the forms required by the Kansas Fee Schedule. Once the bills were received on the proper forms, they were paid in less than 20 days after the proper forms were received by the insurance carrier, but not within the 20-day demand period.

Another hearing was held on the clamant's request for penalties. At that hearing respondent argued the bills were not initially submitted on forms required by the Kansas Fee Schedule and, therefore, no penalties could be imposed. The Board ultimately concluded in *Wright* that an ALJ's order for payment of medical bills must be treated as a payment of medical bills in accordance with the Kansas Fee Schedule. In *Wright*, the Board concluded, "On the other hand, K.S.A. 44-510 makes any medical bill which does not comply with the fee schedule void and unenforceable."¹³

ANALYSIS

In his brief, claimant's attorney cites statutes limiting the jurisdiction of the Board in considering appeals from preliminary orders. However, an award of penalties is not a preliminary order pursuant to K.S.A. 44-534a and is treated as a final award. K.S.A. 2010 Supp. 44-551(i)(1) grants the Board jurisdiction over all final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a. Additionally, the Board in *Burciaga* and other cases has consistently ruled that it has jurisdiction to review penalty awards. Therefore, the Board has jurisdiction to review the ALJ's Order assessing penalties.

The Board finds the ALJ's June 14, 2011, Order should be affirmed. Two important facts are critical to the Board's affirmation. First, respondent agreed to the March 10, 2011, Order. It agreed to pay five specific medical bills of specific amounts. Second, the March 10, 2011, Order does not indicate the medical bills are to be paid in accordance with the Kansas Fee Schedule.

Respondent could have requested the ALJ change the language of the March 10, 2011, Order to indicate the bills were to be paid in accordance with the Kansas Fee Schedule or to delete the specific dollar amounts that respondent was being ordered to pay. It did neither. Moreover, respondent did not appeal the ALJ's Order but instead allowed it to become a final order.

Respondent did not present evidence that it, or Travelers, utilized the procedures set out in K.S.A. 44-510j. That statute provides that if an employer or insurance carrier disputes a medical bill, within 30 days, they shall notify the provider of the nature of the dispute. This would include not using the proper form for payment, or failing to comply with

¹³ *Id.*

the Kansas Fee Schedule. If the dispute cannot be resolved, the employer or carrier can request an informal hearing before the Director to resolve the problem.

The Board acknowledges *Wright*, but the facts in *Wright* are distinguishable from the facts in the current claim. In *Wright*, an Order was issued by the ALJ requiring respondent to pay "outstanding medical." The order did not identify the medical providers, or the specific expenses or amounts. Here, the parties agreed to specific medical providers and specific expenses to be paid. Respondent agreed to pay and was therefore ordered to pay those specific amounts. Penalties were assessed because respondent failed to comply with the ALJ's Order, an order to which respondent agreed.

Another important difference between the facts of *Wright* and the current claim is how the Order for payment of medical bills came about. In *Wright*, respondent opposed the payment of the medical bill and the Order was issued after a contested hearing. Here, respondent agreed to pay specific medical bills.

In *Wright*, respondent presented evidence indicating the date the insurance carrier sent the bill to its offices in Iowa for payment. Evidence was presented showing the medical provider did not respond to the insurance carrier's request to use the form required by the Kansas Fee Schedule and that a second request was sent. Here, no evidence was presented to show how many times respondent requested the medical providers use the proper form or the dates the requests were sent. Nor were the responses of the medical providers placed in evidence. Respondent asserts the medical providers agreed to accept a reduced payment on their bills. However, no documents to prove this were made part of the record. Simply put, respondent provided scant evidence to prove it made a concerted and timely effort to comply with the ALJ's March 10, 2011, Order.

Respondent next argues that if penalties are awarded, said penalties should be based on the actual amounts paid by respondent to medical providers, not the amounts contained in the March 10, 2011, Order. The Board rejects this argument. Respondent was ordered to pay the medical providers the specific amounts listed in the Order. Respondent agreed to pay the amounts listed in the Order, not a lesser amount. Furthermore, respondent presented no evidence to prove its contention that the medical providers accepted the amounts they received as full payment.

CONCLUSION

1. The Board has jurisdiction to review the ALJ's Order assessing penalties against respondent.

2. The ALJ's June 14, 2011, Order should be affirmed.

WHEREFORE, the Board affirms the June 14, 2011, Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of September, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

As discussed at length in *Wright*, the provisions of K.S.A. 44-512a and K.S.A. 2010 Supp. 44-510i (then K.S.A. 44-510) can be applied in two ways. First, the provisions can be read together by construing an order for payment of medical expenses as an order that the bills be paid as submitted, without regard to the Kansas Fee Schedule. The order for payment would then make the bills due as of the date of the order. Claimant must wait 10 days after the order is issued to make written demand for payment. Once written demand is made, respondent is obligated to pay the bills within 20 days or penalties may be assessed. This construction gives full effect to the claimant's right to enforce payment of the expenses but ignores the provisions relating to the Kansas Fee Schedule.

Second, one can assume that any order for payment of medical expenses incorporates the fee schedule and is, in effect, an order for payment according to the provisions of the fee schedule. This reading gives full effect to the Kansas Fee Schedule provisions but impedes substantially claimant's right to enforce payment of the medical bills. Claimant is at the mercy of the medical provider to use the claim forms required by the Kansas Fee Schedule. Claimant is not able to enforce payment of any statement so long as there is a dispute about compliance with the fee schedule.

The Board in *Wright* concluded:

Although neither alternative appears to be a perfect problem-free solution, the Board concludes that an ALJ's order for payment of medical expenses must be treated, even where it does not expressly so state, as an order for payment according to the fee schedule. The language of the fee schedule seems to

foreclose other possible resolution. Medical fees which are not in accordance with the schedule are void and unenforceable. If they are unenforceable they must be unenforceable by the ALJ. In addition, penalties only apply to payments which are past due. Medical bills which are void and unenforceable cannot be considered past due. Finally, we note the claimant has protection from collection actions. Once claimant initiates the workers compensation action, K.S.A. 44-510(b) prohibits filing or further prosecuting any action against the claimant to collect medical bills.

According to statements of counsel for respondent and its insurance carrier, the medical providers failed to submit medical bills using the CMS 1500 form or an equivalent form required by the fee schedule. *Wright* provides that when medical bills are not submitted in accordance with the Kansas Fee Schedule they are void and unenforceable. Until the medical bills are submitted on the form required by the Kansas Fee Schedule, they cannot be considered due and owing.

Admittedly the March 10, 2011, Order was agreed upon and does not contain language that payment of the medical bills is subject to the Kansas Fee Schedule. In *Wright*, there was no indication the Order contained language that payment of medical bills was subject to the provisions of the Kansas Fee Schedule. The mere fact that respondent agreed to pay specific medical bills does not trump the statutory requirement of K.S.A. 2010 Supp. 44-510i that the Kansas Fee Schedule be used.

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge